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No. 80-1909

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE HEPPENSTALL COMPANY, PETITIONER

v.

WILLIAM A. MURPHY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether petitioner's employees may recover pension benefits from petitioner after its pension plan has been terminated, where petitioner had promised such benefits in a collective bargaining agreement and had not disclaimed its direct liability for the benefits, even though the enforcement of such direct liability may cause petitioner's total payments to exceed the limitation of 30% of its net worth on its statutory obligation to the Pension Benefit Guaranty Corporation under the Employee Retirement Income Security Act.

2. Whether petitioner's employees were required to submit their pension claims against petitioner for pension benefits to arbitration under the provisions of a collective bargaining agreement that required arbitration of pension disputes only with respect to a participant's eligibility for a pension or the amount of his pension.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the district court is reported at 473 F. Supp. 783 (Pet. App. 14a-18a). The opinion of the court of appeals is reported at 635 F. 2d 233 (Pet. App. 1a-13a).

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1980 (Pet. App. 24a-25a). A petition for rehearing was denied on January 9, 1981 (Pet. App. 26a-27a). By order dated March 24, 1981, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 8, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is a private action brought by 16 retired employees of petitioner, The Heppenstall Company, to recover unpaid pension benefits directly from their employer, following the involuntary termination of a pension plan maintained by petitioner pursuant to a collective bargaining agreement (Pet. App. 2a-3a). Prior to its termination, petitioner's pension plan was a qualified plan covered by the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 *et seq.* (ERISA).[1] As the sponsoring employer, petitioner made contributions to the plan from 1950 through 1976. In August 1977, petitioner notified the Pension Benefit Guaranty Corporation (PBGC) it would be unable to make sufficient contributions to the plan to meet the minimum funding standards prescribed by ERISA because it was experiencing temporary cash problems. Subsequently, on October 31, 1978, petitioner notified the PBGC that it had not made any contributions to the plan for its fiscal years ended October 31, 1977, and October 31, 1978, and that the assets of the plan were insufficient to pay benefits for more than a few months. As a result, on December 18, 1978, the PBGC filed a complaint in the United States District Court for the Western District of Pennsylvania pursuant to Section 4042(c) of ERISA (29 U.S.C. 1342(c)), seeking a decree adjudicating that the plan

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[1]This action was brought pursuant to Section 502(a)(1)(B) of ERISA (29 U.S.C. 1132(a)(1)(B)), which authorizes a participant or beneficiary to bring a civil action to recover benefits due him under the terms of a pension plan subject to ERISA. The jurisdiction of the federal district court was invoked under Section 502(e)(1) of ERISA (29 U.S.C. 1132(e)(1)), which provides that state courts of competent jurisdiction and federal district courts shall have concurrent jurisdiction of actions brought under Section 502(a)(1)(B).

should be terminated as of the date the complaint was filed (Pet. App. 3a, 14a).[2]

On May 31, 1979, petitioner ceased all operations and discharged more than 330 hourly workers, including 115 participants in the pension plan involved in this litigation who became eligible to retire by reason of termination of their employment with petitioner (*ibid.*). At a hearing held by the district court on June 27, 1979, in the plan termination suit filed by the PBGC, the evidence showed that petitioner's plan had assets of only $155,000, and had vested benefits guaranteed by the PBGC amounting to between $12 and $15 million (*Pension Benefit Guaranty Corp.* v. *Heppenstall Co.*, 633 F. 2d 293, 299-300 (3d Cir. 1980)). In addition, the plan had unfunded liabilities which reflected the cost of pensions payable under petitioner's collective bargaining agreement in excess of the statutory limitation on the benefits guaranteed by the PBGC (633 F. 2d at 300). See Section 4022 of ERISA, 29 U.S.C. 1322. See also 29 C.F.R. 2605 and 2609.[3] The present action was brought to recover directly from petitioner, as the sponsoring employer, the difference between the pensions provided in petitioner's

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[2]See *Pension Benefit Guaranty Corp.* v. *Heppenstall Co.*, 633 F. 2d 293, 297-298 (3d 1980). In that case, the court held that the district court had the authority to order the plan terminated at the request of the PBGC where the evidence showed that the plan was underfunded and was continuing to accrue unfunded benefit liabilities which would eventually increase the amount to be paid out of the trust fund administered by the PBGC unless termination was ordered. The case was remanded to the district court for further proceedings to establish an appropriate termination date (*ibid.*). Some of the facts relevant to the resolution of the present case were set out by the court of appeals in its opinion in *Pension Benefit Guaranty Corp.* v. *Heppenstall Co.*, *supra*, and incorporated by reference in its opinion in this case (Pet. App. 3a). We have relied in part on these two opinions by the court of appeals to establish the facts of the case.

[3]These provisions were recodified as 29 C.F.R. 2613 and 2621, respectively, effective June 29, 1981. 46 Fed. Reg. 32575 (1981).

pension agreement with the United Steelworkers and the amounts guaranteed by the PBGC (Pet. App. 2a-3a).

The district court held that petitioner was directly liable to the employees for their pensions under general contract law (Pet. App. 16a-17a). The court concluded that nothing in ERISA or in the language of petitioner's pension plan, as modified to meet the requirements of ERISA, exonerated petitioner from such liability (Pet. App. 15a-17a). Furthermore, the court held that this claim was not an arbitrable dispute within the scope of the compulsory arbitration clause of the pension agreement between petitioner and the United Steelworkers, because the employees had already retired, and each of them had previously established both his right to receive a pension and the amount due. Under the compulsory arbitration clause, only controversies concerning pension eligibility and the amount payable to a participant under the pension plan were within the scope of arbitration (Pet. App. 17a).

The court of appeals affirmed. It held that ERISA did not preclude direct employer liability for pension payments in excess of the amounts guaranteed by the PBGC (Pet. App. 3a). The court rejected petitioner's claim that Congress intended to limit an employer's total liability for pension benefits to the 30% of net worth amount recoverable by the PBGC under Section 4062(b) of ERISA (29 U.S.C. 1362(b)). In so ruling, the court pointed out that nothing in the legislative history of ERISA showed that Congress intended to prohibit an employer from undertaking an affirmative obligation to its employees to pay all vested pension benefits (Pet. App. 9a-13a). Here, the court concluded that in its contract with the United Steelworkers, petitioner affirmatively promised to pay pensions to its employees, and reserved the right to determine the manner in which it would fund those pensions. Hence, petitioner could not evade the obligation once the PBGC had acted to provide

the minimum pension guarantees provided under Title IV of ERISA, Sections 4001-4082, 29 U.S.C. 1301-1381 (Pet. App. 9a-13a).

Finally, the court of appeals affirmed the district court's holding that this dispute over the employer's liability for pension payments was not within the scope of the compulsory arbitration clause of the pension agreement because the retirees were not seeking to establish their rights to a pension under the agreement, or to establish the amount of any such pension (Pet. App. 6a).

ARGUMENT

1. The decision below correctly held that petitioner had affirmatively obligated itself to pay fully vested pension benefits to its employees even though the required additional payments exceeded petitioner's statutory obligation under ERISA to the Pension Benefit Guaranty Corporation.

In seeking review by this Court, petitioner contends (Pet. 5-6) that the decision below interprets ERISA in a manner that will impose large unforeseen liabilities on employers sponsoring qualified pension plans. But the court of appeals cast its decision in narrow terms. The court carefully pointed out (Pet. App. 12a-13a) that ERISA, as construed by this Court in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 378-380 (1980), permits an employer to limit its overall pension liability to its statutory liability to the PBGC of 30% of its net worth by agreeing to fund a pension trust and disclaiming any direct liability to its employees.[4] On the other hand, nothing in ERISA

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[4]Under the plan termination insurance provisions of ERISA, as contained in Section 4001 *et seq.* of the Act (29 U.S.C. 1301 *et seq.*), each participant's vested benefit is guaranteed by the PBGC up to a statutory limit prescribed by Section 4022 of the Act (29 U.S.C. 1322) if a plan is terminated voluntarily or involuntarily while the insurance coverage applies to it. Subject to certain exceptions, none of which is applicable here, the insurance coverage applies to all defined benefit

restricts an employer from further promising to provide pension benefits in an amount greater than the amounts guaranteed through the operations of Title IV of ERISA. Thus, the liability imposed upon petitioner by the decision below will come into play only in cases where, as here, the employer promises to pay pension benefits of a particular amount and does not disclaim direct liability to its employees. And even in those cases, the liability is not an unforeseen consequence of a judicial interpretation. To the contrary, it arises out of a contractual obligation assumed by the employer in the course of its business.[5]

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plans meeting the requirements of the Internal Revenue Code for treatment as qualified plans. Section 4021 of ERISA (29 U.S.C. 1321). If a covered plan is terminated, and the net assets of the plan are insufficient to pay all guaranteed benefits, the employer is liable to reimburse the PBGC for the unfunded benefits paid out under the guarantee, up to a limit of 30% of the employer's net worth. Section 4062 of ERISA (29 U.S.C. 1362).

[5]Here, petitioner presumably received a *quid pro quo* in exchange for its promise to pay fully vested pensions upon plan termination. The pension agreement between petitioner and the United Steelworkers of America provides that petitioner may establish a new trust or use an existing trust to fund the promised benefits (Pet. App. 5a). The agreement goes on to state (Pet. App. 5a):

> The Company is free to determine the manner and means of making provision for funding and paying the pension benefits set forth in this Agreement.

Because this agreement was negotiated in the course of collective bargaining, it is quite unlikely that petitioner could have persuaded the representatives of the United Steelworkers to accept such a clause unless it was willing to undertake direct liability for ultimate payment of the promised pension benefits. See, D. McGill, *Fundamentals of Private Pensions* 170-171 (4th ed. 1979). This is especially true because the benefits payable under this agreement exceeded the amounts guaranteed by the PBGC, leaving the employees at risk for the payment of the balance of their pensions if petitioner's pension plan were terminated when it had insufficient assets to meet all its liabilities. *Pension Benefit Guaranty Corp.* v. *Heppenstall Co.*, *supra*, 633 F. 2d at 300.

Although most employers included a disclaimer of direct liability in their pension plans prior to the enactment of ERISA, there were some employers which did guarantee the payment of at least some categories of pension benefits to their employees. D. McGill, *Employer Guarantee of Pension Benefits* 19-35 (1974). In July 1973, Professor McGill sent a questionnaire to 600 large corporations to survey their practices with respect to corporate guarantees of pension benefits. *Id.* at 19. Of the 225 usable responses received, the survey showed that 29 companies, or 13%, were directly obligated to pay some or all of their pension benefit liabilities. *Id.* at 19-23. The survey showed that there was a wide variation in the extent of such guarantees, some being limited to benefits payable to employees who had already retired, while others covered the accrued benefits of current and former employees to a greater or lesser extent. *Id.* at 23-24. Although the results of this study were not published until after ERISA had been enacted (*id.* at 8), there is nothing in ERISA that suggests that Congress intended to prohibit the use of such contractual guarantees, to the extent that employees could obtain them, to provide protection for their pension rights beyond the minimum guarantee which ERISA required through the mechanism of the mandatory plan termination insurance administered by the PBGC, and the associated employer liability contained in Section 4062 of ERISA (29 U.S.C. 1362). See pages 5-6, note 4, *supra*.

As this Court pointed out in *Nachman, supra*, 446 U.S. at 378, Congress was aware of the fact that most pension plans contained a disclaimer of direct employer liability for the payment of unfunded pension benefits. Because of those disclaimers, Congress recognized that some disincentive was necessary to prevent a rush of plan terminations which could undermine the proposed plan termination insurance system. Absent such a disincentive, employers might be

encouraged to terminate underfunded plans and thereby transfer their pension obligations to the PBGC. As Congressman Erlenborn[6] explained during the legislative deliberations that preceded the enactment of ERISA (120 Cong. Rec. 4285 (1974), reproduced in Senate Comm. on Labor and Public Welfare, *II Legislative History of the Employee Retirement Income Security Act of 1974*, 94th Cong., 2d Sess. 3388 (Comm. Print 1976)):

> The only way that one can make termination insurance something other than a dumping ground for the obligations of the employer is to put some sort of obligation on the employer. At the present time the legal foundation of pension plans is that the employer sets up a pension trust and promises to make periodic contributions into that trust. If there are sufficient assets, the employee will get the pension that has been described; if there are not, he does not get it; he gets something less. But the employer up until the present time generally has not made a promise to pay the pension, only to make periodic contributions.

Although Congress was understandably concerned about the possibility that employers would be reluctant to establish or maintain pension plans if it imposed an increase in direct liability on those employers who had previously disclaimed any liability except for the required contributions to a pension trust (see S. Rep. No. 93-383, 93d Cong., 1st Sess. 87 (1973)), there was no corresponding reason for Congress to limit direct employer liability for affirmative

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[6]Congressman Erlenborn was a member of the Committee on Education and Labor, 119 Cong. Rec. 2108 (1973), and took part in the work of the General Subcommittee on Labor, which held extensive hearings on the subject of private pension reform and drafted H.R. 2, 93d Cong., 1st Sess. (1973), one of the bills which was eventually incorporated into ERISA. See 120 Cong. Rec. 4272, 4274 (1974).

promises to pay pension benefits beyond those guaranteed by Title IV of ERISA. Indeed, the enforcement of such an undertaking is entirely consistent with the goals of ERISA. As this Court stated in *Nachman, supra,* 446 U.S. at 374--

> One of Congress' central purposes in enacting this complex legislation was to prevent the "great personal tragedy" suffered by employees whose vested benefits are not paid when pension plans are terminated. [Footnotes omitted.]

Here, petitioner's contractual liability arises out of collective bargaining. *Pension Benefit Guaranty Corp.* v. *Heppenstall Co., supra,* 633 F. 2d at 295; Pet. App. 71a-73a. The terms of the plan in question follow the pattern used by the United Steelworkers in their agreements with other major steel producers, one of which was litigated in *In re Alan Wood Steel Co.,* 4 Bankr. Ct. Dec. 850, 858-860 (E.D. Pa. 1978). There, as here, the court held that the employer was directly liable for the payment of the pensions promised under the agreement, and that nothing in ERISA barred the enforcement of such liability. Accord, *In re M&M Transportation Co.,* 3 Bankr. L. Rep. (CCH) 722 (S.D.N.Y. 1980). Thus, the court of appeals correctly concluded (Pet. App. 8a-11a) that petitioner was directly liable to its employees for the pension benefits that it promised to them, and that the employees could sue on petitioner's promise to recover any benefits in excess of those guaranteed by the PBGC when its pension plan was terminated.[7]

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[7]Petitioner argues (Pet. 11-12, 23-24) that the statutory right of an employee to bring an action to recover pension benefits (Section 502(a)(1)(B) of ERISA (29 U.S.C. 1132(a)(1)(B)) applies only to a suit against the pension plan. But the statute contains no such restriction, and the courts have correctly held that actions under this section can be maintained directly against an employer. *Landro* v. *Glendenning Motorways, Inc.,* 625 F. 2d 1344, 1351-1353 (8th Cir. 1980); *Pinto* v. *Zenith Radio Corp.,* 480 F. Supp. 361, 363 (N.D. Ill. 1979), aff'd, 618 F. 2d 110 (7th Cir. 1980); *Murphy* v. *Inexco Oil Co.,* 622 F. 2d 570, 573 (5th Cir. 1980).

2. Petitioner further argues (Pet. 20-22) that in holding that the arbitration clause of the collective bargaining agreement did not apply to this dispute over its liability for pension payments, the decision below conflicts with *Amato* v. *Bernard*, 618 F. 2d 559 (9th Cir. 1980), and *Challenger* v. *Local Union No. 1 of International Bridge, Structural & Ornamental Ironworkers*, 619 F. 2d 645 (7th Cir. 1980). Moreover, petitioner asserts that the decision of the court of appeals on this issue contravenes this Court's policy of requiring an aggrieved employee who is covered by a collective bargaining agreement to exhaust his remedies, if any, under the grievance and arbitration clause of the contract before resorting to the courts. *E.g.*, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 580-583 (1960); *Republic Steel* v. *Maddox*, 379 U.S. 650, 652-653 (1965).

But the policy in favor of arbitration does not exist in a vacuum; the parties must have agreed to submit a particular type of dispute to arbitration, and the issue of arbitrability is itself a justiciable one. *Steelworkers* v. *Warrior & Gulf Co.*, *supra*, at 582; *United States* v. *Moorman*, 338 U.S. 457, 462 (1950). Here, both the district court (Pet. App. 17a) and the court of appeals (Pet. App. 6a) held that the issue whether petitioner was liable for pension benefits claimed was not a dispute concerning an employee's right to a pension or the amount of his pension, and hence was not within the arbitration clause of the contract. Nothing in this conclusion violates the policy in favor of arbitration. Even on the assumption that doubts concerning arbitrability "should be resolved in favor of coverage," *Steelworkers* v. *Warrior & Gulf Co.*, *supra*, 363 U.S. at 583, the issue here is one of law in which the factors favoring arbitration have very little weight. In contrast to the issues held to be subject to arbitration in *Amato* v. *Bernard*, *supra* (calculation of pension credits), and *Challenger* v. *Local Union No. 1*, *supra* (loss of pension credits earned prior to a three-year

break in service), none of the employees in this case is involved in a dispute over the application of the petitioner's pension plan to the facts of his employment history. Therefore, the decision below does not conflict with the cases cited by petitioner. Similarly, the resolution of this dispute can have little effect on morale at the petitioner's plant or on the maintenance of industrial peace there because petitioner had sold its assets and terminated its pension plan. *Pension Benefits Guaranty Corp.* v. *Heppenstall, supra,* 633 F. 2d at 299. See *Steelworkers* v. *Warrior & Gulf Co., supra,* 363 U.S. at 581-582; *Republic Steel* v. *Maddox, supra,* 379 U.S. at 656-657.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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